Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Retention by Broadcasters of Program Recordings	)	MB Docket No. 04-232
	)	

COMMENTS OF THE KENTUCKY BROADCASTERS ASSOCIATION

The Kentucky Broadcasters Association (hereinafter "the Association") submits these comments in response to the Notice of Proposed Rulemaking released July 7, 2004 in the above-captioned proceeding (the "NPRM"). The Association is comprised of approximately 275 commercial and non-commercial radio and television stations in the State of Kentucky. The Association's purpose is to represent and further the interest of broadcasters, communicate relevant information to broadcasters through meetings and publications, and provide educational services through conventions, workshops, or other appropriate means in order to better serve the public.

The NPRM tentatively proposes that, to enhance the Commission's enforcement of indecency complaints, all broadcasters record and retain for some period, such as 60 to 90 days, all programming transmitted between 6:00 a.m. and 10:00 p.m., the hours when indecent programming is prohibited (hereinafter the "proposal"). The proposal is far from concrete, however. Open issues include such critical matters as whether to require broadcasters to record programming 24 hours a day, what length of time constitutes an appropriate retention period, and whether the recording requirements should be crafted to be "useful" in other enforcement actions. In other areas the NPRM is strangely silent. For example, although the Commission acknowledges that the proposed record retention

requirements "will affect the record-keeping practices of broadcast stations,"[1] the NPRM fails to clarify whether these practices refer to a broadcaster's private internal records, records that must be retained at the station, or more public records that the Commission envisions will be filed on a periodic basis.

The lack of details regarding this proposal are troubling, particularly in light of the Commission's recognition that it raises complex issues, including those involving constitutionally-protected free speech and third-party rights. More troubling is the fact that the Commission is advancing the mandatory recording-and-retention proposal even though there is no evidence that the proposed requirement - which will unduly burden broadcasters - will benefit either complainants, the station's community of license or the Commission. Like the hundreds of broadcasters that have already submitted comments in this proceeding, the Association urges the Commission to reject the proposal.

Discussion

The Commission's current procedures for the filing of indecency complaints require that the complainant provide (1) the call sign of the station involved; (2) the date and time of the broadcast; and (3) sufficient information regarding the content at issue to place it in context, generally accomplished by providing a tape, transcript or significant excerpt from the program.[2] A complaint may be dismissed or denied in those cases when the Commission is unable to obtain sufficient information from either the complainant or licensee to determine whether the programming aired was indecent, obscene, or profane.

By the Commission's own account, nearly 100 percent of all indecency complaints filed in the last several years have been deemed sufficient to warrant further

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1 NPRM at para. 9.

investigation. Specifically, of the 14,379 total indecency complaints received between 2000 and 2002, only 169 - or 1.18 percent - were denied or dismissed for lack of tape, transcript or significant excerpt. During the 2003-2004 period, the Commission received 771,235 total indecency complaints and denied or dismissed only 24 - that is, 0 percent - for lack of tape, transcript of significant excerpt.[3] Dismissal/denial rates of close to zero percent demonstrate that current procedures are not an obstacle to the filing of sufficient complaints, nor are they hampering the Commission's ability to evaluate those complaints. These rates prove that current procedures are more than adequate to provide the Commission with all the information it needs to fully evaluate allegedly indecent, obscene or profane programming.

There is every indication that the dismissal/denial rates will remain at or close to zero percent. Certainly the Commission's 2004 *Clear Channel* decision has given the broadcast industry a substantial incentive to cooperate in the development of a complete record. *Clear Channel Broadcasting Licensees, Inc.*, 19 FCC Rcd 1768 (2004)(when a licensee can neither confirm nor deny a complainant's allegations of indecent broadcast, then the Commission may find that the broadcast occurred). The NPRM, in fact, recognizes this incentive.[4]

More importantly for Association members, however, is their own interest in airing programming that reflects the standards of the communities in which they operate.

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[2] NPRM at para. 4.

[3] *See* March 2, 2004 Letter of Michael Powell to Rep. Dingell. Chairman Powell's letter reveals that the Commission received an extraordinary number of duplicative complaints regarding a handful of shows during the period 2003-2004. Even when these duplicative complaints are excluded, the denial/dismissal rate is remarkably low. For example, of the 771,235 complaints received during 2003-2004, it appears 770,665 were duplicative. Of the remaining 570 presumably non-duplicative complaints, only 24, or only approximately four percent, were dismissed for lack of a tape, transcript or significant excerpt.

In fact, review of the Enforcement Bureau Indecency webpage finds one Kentucky station having been sited for an indecency matter – and that related to the nationally syndicated Howard Stern Show.[5] Kentucky stations do not generate complaints because they look first to their communities of license, not the Commission, for guidance as to appropriate programming. They understand that it is in their own best interests to serve, not offend, their communities. Their community ties create powerful market and social incentives to take steps necessary to avoid the transmission of indecent, obscene or profane programming.

These market and social incentives guarantee that for the vast majority of broadcasters - including Association members - the Commission will never need nor will it request the programming that these stations would be obligated to record and retain under the proposal. Even if an indecency complaint were to be filed, there is no indication that these same broadcasters would be unwilling to voluntarily provide the Commission with sufficient information to evaluate the complaint. Certainly for these broadcasters, the NPRM is a solution in search of a problem.

The only certain result of the proposal is that the costs associated with operating broadcast stations, particularly smaller stations, will rise. Because the parameters of the Commission's proposal are not well-defined, it is extremely difficult at this point to offer estimates regarding the hardware, software and labor costs associated with equipment purchase, installation, operation, maintenance and upgrades, as well as those associated with back-up and storage. Comments filed to date indicate that the stations operating in the smaller markets will suffer most; they will find themselves with few alternatives and

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[4] NPRM at n 9 ("Under such circumstances, broadcasters may find it in their interest to retain recordings for a longer period than [the 60-to-90 day period] the proposals above suggest.").

will be unable to negotiate cost-savings available to broadcasters operating in the larger markets.[6] Smaller operators will incur significantly greater relative costs than larger operators, whose size will allow them to spread the costs among multiple stations and negotiate volume discounts. In addition, reporting costs will also increase but because it is not clear what reporting requirements would be associated with the proposal, no meaningful estimates can be offered at this time.

The Commission has previously declined to impose recording requirements on commercial broadcasters, in part due to the disproportionate economic impact on smaller broadcasters. In 1977 the Commission adopted a rule in response to Congressional direction (subsequently invalidated on constitutional grounds) requiring all noncommercial educational broadcasting stations obtaining financial support from the Corporation for Public Broadcasting to retain an audio recording of broadcast programs discussing any issue of public importance.[7] Significantly, the Commission cited economic considerations, including impracticability and the disparate effect on small broadcasters, in declining to extend the rule to commercial stations. The concerns underlying the Commission's decision then are equally applicable today:

> Opinions may vary as to the amount of those costs, but there is no doubt that production, retention, retrieval, and playback of the recordings would cause almost every station to expend money which is not available for public service programming or other purposes. No public funds or equipment grants . . . would be available to help the commercial broadcaster . . . meet the present taping requirement. We are concerned

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[5] *See* http://www.fcc.gov/eb/broadcast/NAL.html. File No. EB-03-IH-0110, released April 8, 2004.

[6] *See, e.g., Comments of VoiceLog LLC* at 2 ("We feel very confident that we could provide service at or below the upper range of these rates in medium-to-large markets and believe that we could potentially offer service at lower rates than the low side of the range in very large markets.").

[7] That congressional direction was articulated in former Section 399(b), 47 U.S.C. § 399(b). *In the Matter of Petition for Rulemaking to Require Broadcast Licensees to Maintain Certain Program Records*, Third Report and Order, 64 FCC2d 1100, 1110-1111 (1977) (*Third Report and Order*); *overruled, Community-Service Broadcasting of Mid-America, Inc. v. F.C.C.*, 593 F.2d 1102 (D.C. Cir. 1978).

> that the burden would fall in a disproportionately heavy manner on very small stations . . . .[8]

Then as now, for smaller broadcasters operating on tight budgets, the increased costs associated with programming recording and retention will necessarily translate into spending reductions in other areas. Likely targets for these reductions will be those areas in which the broadcasters have some budget discretion, such as public service programming, local productions, and community outreach. These cuts will be forced upon broadcasters by the Commission's proposal even though the record establishes that the vast majority of the indecency complaints received by the Commission during the last several years have been directed at less than a dozen programs that are readily available from a myriad of sources.

According to information submitted recently by the Commission to the House Subcommittee on Telecommunications and the Internet, over 99 percent of the complaints received during the 2002-2004 period - 784,199 of 785,157 complaints - pertained to only 10 specific programs.[9] As the Commission is well aware, modern recording devices guarantee that tapes, transcripts or significant excerpts of these few programs are readily-available; in other instances, watch-dog groups stand guard taping programs in anticipation of allegedly offensive material. Under these circumstances, there can be no reason to require that these programs be recorded and retained by individual stations across the country, in all markets. It is incredible that the Commission, in response to public outcries targeted at a handful of programs offered by the largest networks and syndicators, would seriously consider penalizing *all* broadcasters and their communities.

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8 *Third Report and Order* at 1113-1114.

9 March 2, 2004 letter of Michael Powell to Rep. Dingell.

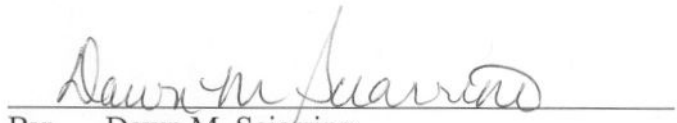
Conclusion

There is no evidence that the mandatory recording and retention proposal will advance the stated objective of increasing the Commission's effectiveness in enforcing restrictions on obscene, indecent and profane broadcast programming. The record demonstrates that the proposal will impose regulatory burdens on broadcasters and diminish their ability to serve their communities, with no countervailing benefit.

WHEREFORE, the Commission should reject the proposal and retain the *status quo*. It should continue to require that complainants make some minimum initial showing, generally by tape, transcript or significant excerpt. If additional information is required, the Commission should continue to rely on incentives currently in place to request and obtain that information from broadcasters.

Respectfully submitted,

KENTUCKY BROADCASTERS ASSOCIATION



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